72-1411

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1411

LOUIS EDWARD JENNINGS,
Petitioner,
-vs-
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the District of Arizona, convicting the petitioner for a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on See Appendix B to this petition. This petitioner's Petition for Rehearing was denied by the Court of Appeals on March 8, 1973. See Appendix C to this Petition.

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to See Appendix D to this Petition.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

A. Administrative Agency Questions:

(1) May an administrative agency (here, the Selective Service System) wholly ignore

a nomination of conscientious objector civilian work choice made by its registrant, where, as here, the agency's law explicitly promises consideration of a registrant's work choice and especially so where the work choice he nominated is prima facie 100% consistent with the standards set by Congress?

(2) May the void in such a record be implicitly filled by the doctrine of official regularity?

(3) Is the agency required to aid its registrants in the factual situation presented by the record or is the Selective Service System intended to be an adversary procedure?

B. Constitutional Questions:

Peace time draft for civilian work has no sound legal basis.

All the above questions were raised in the trial court by a written motion for judgment of acquittal and argued in the Court of Appeals.

4. STATUTES AND REGULATIONS INVOLVED

Involved are Article 1 of the Constitution; the First Amendment and the following

agency regulations §§ 1606.51, 1622.14, 1660.20, 1660.20 (b). They are set forth in Appendix E.

5. STATEMENT OF THE CASE

The indictment charged the petitioner with two violations of the Universal Military Training and Service Act. Count I was failing to do the civilian work orders and Count II was failure to keep the local board informed of his address.

Petitioner pleaded not guilty to each count and was tried by the Honorable Walter E. Craig, District Judge, sitting alone without a jury. He was found Not Guilty on Count II and Guilty on Count I. He was sentenced to custody of the Attorney General under the Youth's Correction Act with a recommendation that he be held no more than two years. [C.R. 28]. He is presently on O.R. bail pending determination of his appellate efforts. [C.R. 28].

FACTS

The facts are found in the record; the

Exhibit* and the Reporter's Transcript.

On October 10, 1967 defendant, a registrant of Local Board No. 8, Arizona, applied for a conscientious objector classification by timely filing a fully executed SSS Form No. 150, Special Form for Conscientious Objector, together with letters of support.

On January 19, 1968 he was classified in Class I-A and on January 8, 1969, after exhausting his administrative remedies, he was sent an order to report for induction into the military and on the date specified for the induction ceremony he refused to submit to it.

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*/The "Exhibit" is the entire Selective Service System file of this defendant, placed in evidence by the plaintiff [Rep.Tr. 3/3]. Many of the sheets in the Exhibit bear none of the usual pagination marking [lower right corner] made by the agency for convenience of all concerned during trial and appeal. Some sheets have two numbers.
Sheets are therefore identified by date and context. Consequently, we do not designate all sheets we refer to chiefly because we believe there will be no controversy on any undesignated ones nor can the Court otherwise be aided in locating them.

Thereafter each of the two offices of the United States Attorney to which the file was sent [C.D. Cal. & D. Ariz.] declined to prosecute.

Thereafter, the Selective Service System reprocessed his case and on February 12, 1970 unanimously reclassified him in Class I-O.

Meanwhile your petitioner had put in a year of social work in Cleveland with the United Church Board For Homeland Ministries, and in anticipation of the duty required of I-O registrants* he procured two letters from aforesaid religious body offering him employment of the kind and duration required of I-O registrants.

These letters, sent to Local Board No. 8 are in the Exhibit and the first, dated April 4, 1968 and signed by Ralph M. Moore, Jr., Secretary for Youth Program reads:

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*/ Two years of social service for a non-profit organization contributing to the maintenance of the national health, safety or interest. 32 C.F.R. § 1622.14

Local Board No. 8
Selective Service System
106 East Roosevelt Street
Phoenix, Arizona

Dear Sirs:

This is to state the support of this office, which is responsible for work among young people of the church throughout the nation, for the appeal for conscientious objector status of Mr. Louis Jennings. We also wish to assure you that we are prepared to place him in a suitable reconciliation project in our educational program as a fulfillment of his alternate service commitment. My superior, the Rev. Edward A. Powers, has communicated to you already his affirmation of Mr. Jennings and his having named me to be supervisor of any work which he might do for this Division.

We have discussed beliefs, convictions, background and philosophy with Mr. Jennings and are very impressed by the depth and breadth of his thinking.

Mature beyond his years and articulate, he is exemplary in his search for a new Christian ministry of service to persons, action in crisis and the building up of new brotherhood. His commitment to peace and a non-violent means of solving conflicts cannot be questioned, in our judgment. We have witnessed his work and his relating to others and have been pleased to note that he has been considered a natural leader among his co-workers.

We hope that you will indicate additional information which we might provide as you make your decisions in Mr. Jenning's case. We urge you to grant him this status, and we assure you of our readiness to define a creative position in our youth work for his satisfactory completion of requirements.

The second, on the same church letterhead is dated April 1, 1968 and is signed by Edward A. Powers, General Secretary, 1505 Race Street, Philadelphia, Pennsylvania

19102. It states:

"Local Board No. 8
106 East Roosevelt Street
Phoenix, Arizona

Gentlemen:

I am writing to you in regard to Louis Edward Jennings who, I understand, is under your care in regard to Selective Service. Mr. Jennings has been serving as a volunteer in the Voluntary Service program which is administered by the United Church Board for Homeland Ministries. His work in our Cleveland project has come to an end and we are prepared to arrange for a two-year voluntary program as an Alternate Service arrangement if your board is prepared to make that disposition of his conscientious objector status.

Mr. Jennings would either work in a single local project during that period or in several projects assisting in health and welfare institutions or in Christian youth work programs. Mr.

> Jennings would be under the direct supervision of the Rev. Ralph M. Moore, Jr. of our staff. We shall, of course, keep you posted on the nature of his work and his performance of it. I am enclosing an interpretive folder which describes some of the work which I administer for our board that will give you a sense of the nature of our programs."

Jennings testified at his trial on October 6, 1972 and outlined his duties during his year's work in the said Cleveland institution "my entire work in Cleveland was background in mass communications -- I edited, photographed and printed an inner-city communications magazine called 'Grass Roots.' I did that for twelve months." [Rep.Tr. 6/22/71].

He testified that when the Local Board sent him a letter dated May 13, 1970 directing him to choose one of the three types of work they nominated (all being in Arizona) he timely signed the alternate, negative answer entitled "2. I do not

offer to perform any of the types of work listed above," and that he wrote "On the back of this paper I wrote a one-line, one sentence, that I said, 'I would appreciate any alternate lists or any other types of lists that would inform me of other available and acceptable employment than the three listed there," but that he never received an answer to this request for assistance.[Rep.Tr.5/13]

He testified that he had worked at the Mendocino County Hospital [Phoenix] in 1972, as ordered. [Rep.Tr. 7/16].

7. REASONS FOR GRANTING WRIT

A. This administrative agency often plays fast and loose with its registrants. This Court has on many occasions had to check-rein its activities.

(1) Failure to consider his nomination.

In this case the agency, despite its governing regulations to the contrary *wholly* ignored its registrant's proper nomination on file, one that was never attacked below as improper.

The doctrine of judicial regularity is inapplicable here and such agencies should not be encouraged to rely on it in our context.

(2) Failure to aid him after request.

An agency dealing with laymen [where legal assistance is explicitly denied them] owes a duty of assistance, especially where, as here assistance was requested.

(3) Board's order was punitive.

B. The constitutionality of peace time draft deserves a hard look.

8. A R G U M E N T

A. The Administrative Agency Questions.

Here, there are three separate, prejudicial derelictions. The local board failed in its duty to consider the relative suitability of the available civilian work possibilities, and in its duty to aid its registrant in the problem's solution.

1. Failure to consider.

At the time Jennings was processed the local board had the duty of work selection

[32 C.F.R. § 1660.20].* It was required to send him SSS Form No. 152, Special Report for Class I-O Registrants.

Said Form No. 152 states, on the front page:

> "By submitting a choice of employment you have an opportunity to select the type of work you will be more interested in and perhaps best qualified to do. There may be opportunities for performing approved types of work with nonprofit organizations, associations, or corporations or with local, State or Federal governmental agencies. If you are qualified for positions that require special skills, training, technical knowledge, or professional education and experience, you should list any additional information that will be of assistance to the employer in assigning you to work that can utilize your highest level of aptitude and skill.

*/ Today the State Director does this per delegation from the Director.

> "In the event you have applied to one of the approved employers for work and have a definite answer to your application, you should show this in Series II on the form. The local board cannot secure special skilled positions for you. However, it will be the policy of the Selective Service System whenever possible to order you to civilian work which will most fully utilize your experience, education and training."

At the time he was processed the forms were part of the regulations that are codified in 32 C.F.R. § 1600 -. The specific regulations that so declared is § 1606.51. Although this section that made the forms part of the regulations has been so far left out of the revised regulations the Agency claims adherence to the same principle of making most effectuve use of 1-O registrants. Attention is invited to Appendix E on this matter.

When appellant answered the local board's suggestion that he choose one of three types they offered he said "No."

At that time the board had before it more than a dozen documents showing his church activity in Cleveland and specifically the job offer by said church organization. There is nothing to show they considered it. There is nothing to show it didn't meet the congressional mandate of kind of work and kind of employer. On the contrary obviously it did.

In any event consideration was required and we even go further: An explanation of rejection is required under such circumstances. Compare Haughton v. United States, 9 Cir., 413 F.2d 736 (1969).

The board was derelict to appellant's prejudice.

2. Failure to aid after his request for aid.

When appellant rejected the three choices offered him he asked for aid. He wanted to know what else was available and, with the clear inference: What is wrong with *my* choice? [Rep. Tr. 5/13 and *infra* at end of next to last ¶ of

his testimony.]

When a registrant makes a reasonable request for assistance the board ignores it at its peril.

Cox v. Wedemeyer, 192 F.2d 920, 9 Cir., 1951.

> ". . . the procedure established under the Selective Service Act of 1940 was designed to fit the needs of registrants unskilled in legal procedure, many of whom, too, were wholly or partially illiterate, and none of them represented by counsel." [922-923]

Also see United States v. Wilson, S.D. N.Y. 345 F.Supp. 894 (1972) where with respect to the issue of excuse for failure to exhaust administrative remedies the court observed: ". . . he sought, in a somewhat bumbling and confused fashion, to obtain help from the official sources which he reasonably expected could give him the necessary advice and assistance, including the Whitehall Street induction center, the Selective Service liaison

officer there, and Selective Service personnel at the Federal Building in Foley Square. Despite his repeated inquiries, he got no help at all on his problem. ." [897] This court went on to say:

"Absent requests for assistance, the Selective Service System is not required to advise registrants as to their qualifications for any of the deferments and exemptions provided by law. *See* Palmer v. United States, 401 F.2d 226, 228 (9th Cir. 1968); United States v. Hosmer, 310 F.Supp. 1166, 1171 (D.Me. 1970). Registrants are furnished with a list of classifications and it is normally up to them, in the first instance, to ascertain whether they qualify for a deferment or exemption and to claim such status.

[3,4] Where, however, a registrant seeks advice and assistance from the System, Selective Service employees must provide him with correct and useful information. It has been repeatedly held that failure to do so invalidates a subsequent induction order. *E.g.*, United

States v. Bagley, 436 F.2d 55 (5th Cir., 1970); United States v. Williams, 420 F.2d 288 (10th Cir. 1970); Powers v. Powers, 400 F.2d 438 (5th Cir. 1968); Petersen v. Clark, 289 F.Supp. 949, 957-958 (N.D.Cal. 1968); Striker v. Resor, 283 F.Supp. 923, 926 (D.N.J. 1968); United States v. Bryan, 263 F.Supp. 895 (N.D.Ga. 1967); United States v. Howe, 144 F.Supp. 342 (D. Mass. 1956). Moreover, the System cannot ignore or disregard requests for assistance. United States v. Bagley, 436 F.2d 55 (5th Cir. 1970)." [898]

Even more recently are United States v. Caluppi, E.D. Penna., 344 F.Supp. 1015 (1972) where this court said:

"In deciding this case, it has been kept in mind that the Selective Service process is not an adversarial process. The board must reach out and give assistance to each registrant. A specific request for assistance should not be essential." [1028]

Compare United States vs. Jacques, 1 Cir. 463 F.2d 653 (1972) at 658.

Finally, in United States v. Timmins, 9 Cir., 464 F.2d 385 (1972):

"The classification of registrants is not an adversary proceeding between the local board and the registrant. United States v. Greene, 220 F.2d 792 (7th Cir., 1955). The registrant is not an antagonist, but rather is a young man dealing with his own government without the aid of counsel in an area of the law which can be extremely technical. He must be able to rely upon the local board to deal with him fairly and to offer him assistance when necessary. The Selective Service System can operate fairly only when the local board, before classifying a registrant, is fully advised of the relevant facts relating to the registrant's circumstances. The board must consider all evidence in the registrant's file." [387]

3. The board's order was punitive.

Despite the fact he had shown the board he could contribute more to the national welfare by an intellectual line of work it assigned him to a menial line of work.

The order that resulted in his conviction was based on a punitive work choice by the local board. Actually, the choice was that of the State Director. This was an abdication of the Local Board's duty spelled out in § 1660.20(b)* but our point centers more on our claim that all the State Director's choices were punitive.

This is a harsh assessment but we believe it fully justified by the record and that it alone is one of the several points present each of which is dispositive of this appeal.

First, the fact cannot be ignored that appellant was given the I-O classification *only* after he refused to submit to induction (on his I-A order) and that the

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*/See Appendix E for text. Attention is especially invited to its language that *requires* a finding by the local board "that none of the types of work submitted by the registrant is appropriate." Here the registrant had submitted a genuine offer for, prima facie, a 100% appropriate type of work.

System also well knew that the United States Attorneys of two separate jurisdictions concurred in refusing to prosecute their registrant each finding that there was no basis in fact for his I-A classification. Chiefly, we rely on the following:

We invite the Court's attention to the legacy the otherwise admirable and genial Lieutenant-General left the Selective Service System: The I-O men are to get as much dislocation in their lives as I-A. This injunction fell on willing ears for few if any executives in the State Director's office or on the local boards are doves.

So, when in the last period of General Hershey's long administration he issued these directives there unquestionably was no effort to compare them with the entire absence of any such Congressional intent. Local Board Memoranda, Nos. 64 and 98 contain General Hershey's "disruption" rules. Despite the fact that these LBMs were

actually no more than intradepartmental communications* there can be no doubt but that they had gospel standing in the agency. It was not until February 8,1972 long after our appellant's processing (and in the "better image" era) that they were rescinded.

L.B.M. NO. 64 issued March 1, 1962 and as amended September 12, 1968 pointed out that the jobs offered ". . . should constitute a disruption of the registrant's normal way of life somewhat comparable to the disruption of a registrant who is inducted into the Armed Forces. . ."

L.B.M. NO. 98 issued September 11,1969 gave the board additional understanding

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*/Glover v. United States, 8 Cir., 286 F.2d 84 (1961): ". . . by reason of an unpublished directive to the local board from State Headquarters the context of which was not generally circulated or made known. This directive, in turn, was based upon advice and recommendations contained in Operations Bulletin No. 123, as amended, from National Headquarters to State Headquarters. Said Bulletin was also unpublished, and was an interdepartmental communication publicly unobtainable.

and motivation: "The registrant does not have a right to select the work which he is to perform unless the job selected is deemed by the local board to be appropriate for the individual registrant, even though work selected by the registrant may fall within the definition appearing in the regulations."

We have already argued that the board *never considered* appellant's nomination. We now argue, and conclude, that if it did (despite the silence of the record) or despite the possible thought that a presumption exists that it is clear that only menial jobs were offered and none of them made good use of his talents and experience elements that would have better aided the country's interest.

B. Constitutionality of Peace Time Work Orders

Many constitutional attacks have been made on military draft laws. Peace time conscription of civilian labor is the only target here.

Excepting *Arver v. United States*, 245

U.S. 366, 38 S.Ct. 159 (1918), none of the varied attacks has been passed on by this Court. A large number of petitions for writs have been filed but certiorari has been denied, leaving standing the adverse opinions below.

Even where certiorari has been granted, *United States v. Seeger*, 380 U.S. 163 (1965) and the constitutional issue squarely presented not even obiter on it is present in the opinion.

In *Welsh v. United States*, 90 S.Ct. 1792 (1970) we find the majority opinion, as in *Seeger*, disposing of the case on a different basis. However, in *Welsh* for the first time we find a concurring opinion that discusses constitutionality.

We urge that our limited attack be considered and present below two factors: (1) that it is a matter of national consequence; (2) that peace time conscription of labor is in tension with the Constitution.

1. Peace time conscription cries out for decision by this Court.

Even much of what the Circuit Courts have written on the constitutionality of *military* conscription has been relatively abrupt and can be likened to the terse reationale used by this Court in *Arver, supra*, the only case it really reviewed: "And we pass without anything but statement" [390].

In the years since *Arver* practically every court considering constitutional attacks has started and sometimes ended, its consideration with little more than a citation of *Arver*.

Arver, however has been academically given the following left-handed appraisals:

Harrop A. Freeman, Professor of Law at Cornell University writing in Virginia Law Review 40, at page 56 says -

> "There are some who find in the Court's opinion the attitude which Shakespeare made famous in the words: 'The lady doth protest too much methinks.' For the court's argument is constantly advanced by this type of wording: 'cannot conceive', 'too frivolous for further notice',

> 'so devoid of foundation', not even a shadow of ground', to do more than state the proposition is absolutely unnecessary', 'unnecessary to follow', 'wholly unnecessary to explore', 'cannot be the slightest doubt', 'it is indisputable', fallacy of the argument', etc."

Another well known Supreme Court-watcher, Philip B. Kurland, in *Religion and the Law*, Aldine, 1962, treats the Court's consideration of the First Amendment problem in *Aryer*, as follows:

> "Mr. Justice White's opinion for a unanimous Court, rendered during the height of the American participation in World War I, disposed of the issue quickly, but without authority or reason. 'And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant

> to the First Amendment resulted from the exemption clauses of the act to which we at the ouset referred, because we think its unsoundness is too apparent to require us to do more.'90 The decision is as sound as the reasons given for it." [37-38]

We believe it fair to urge that the adverse conclusions be reevaluated. Certiorari has never been granted in any of the cases on our point so, in this sense there is still room for opposition. Additionally, recent years have produced some additional hope for high court concern: during the last past five years three Justices have expressed the belief that certiorari should have been granted petitioners that included such points: Brennan, Douglas, Stewart. Additionally, Mr. Justice Harlan, in *Welsh** *supra* wrote a long opinion on the unconstitutionality

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*/"I therefore find myself unable to escape the constitutional question." Mr. Justice Harlan, at 1799

of an attacked portion of the law, this being the first opinion by a Justice hol ing any portion of a modern draft law un- constitutional.

We will now consider *only* the cases on labor draft for a reevaluation.

Cases dealing with constitutionalit of alternative service erroneously assum that forcing conscientious objectors to perform civilian work maintains the moral and discipline of the troops.

This factually incorrect assumption is the sole basis found in case law for compulsory civilian work and first appears in Brooks v. United States, 147 F.2d 134 (2nd Cir. 1945) where the Court speculates that Congress may have con- sidered alternative service necessary "during a great national emergency for its effect upon the morale of those who do serve in the Armed Forces." No autho ity for this proposition is cited, eithe factual or legal. It should be noted that *Brooks* again rises out of the World War II situation. This argument reappea

in Howze v. United States, 272 F.2d 146 (9th Cir. 1959), and more recently the assumption appeared in a decision by the Seventh Circuit United States v. Holmes, 387 F.2d 781 (7th Cir. 1968).

None of these cases cites either authority or facts supporting the assumption. Quite clearly it is so far beyond the common experience of mankind that it cannot be subject to mere judicial notice; this contention is devoid of any support in cases, legislative history, or any of the voluminous material which has been published concerning conscientious objection. Nowhere is there any indication that this fanciful premise was even considered by the Selective Service System, the Department of Defense, or any Congressional committee. It is, with all respect, no more than an *ipse dixit* promulgated in Brooks v. United States, *supra*, and uncritically repeated thereafter.

Indeed, the history of post-World War II conscription legislation points other-

wise. The Selective Service and Training Act of 1940, which provided the basis for the World War II draft, did provide for alternative service which was held constitutionally justified as an exercise of wartime emergency powers. But the first post-war conscription act, the Selective Service Act of 1948, completely eliminated any requirement for civilian work.

> "Any person claiming exemption from combatant training. . .whose claim is sustained by the local board . . shall, if he is found to be conscientiously opposed to participation in such non-combatant service, be deferred." (Emphasis added) Conference Report No. 2438, 80th Congres 2nd Session, June 19, 1948, reveals, at page 2016: 'Conscientious Objectors. The Senate law provided that those conscientious objectors who were found to be opposed to participation in non-combatant service should be assigned to work

> of national importance under immediate civilian direction .. . . The House amendment provided that conscientious objectors found to be opposed to participation in non-combatant service should be deferred from induction for service under the legislation. The conference agreement adopts the provisions of the House amendment. . ."

There was no alternative service from 1948 until it was reenacted as part of Section 6 (j) of the Universal Military Training and Service Act of 1951. A review of the legislative history which led to the 1951 act as well as the legislative history of all subsequent conscription legislation culminating with the Military Selective Service Act of 1967 finds a total absence of any consideration, deliberation, or determination that compulsory work for conscientious objectors is in any way related to the discipline, morale and efficiency of the Armed Services.

See Conference Report No. 346, 90th

Cong., 1st Sess., June 8, 1967, pages 1359-60; House Report 267, 90th Cong., 1st Sess., May 18, 1967, pages 1333-4, 1348; Senate Report 64, 88th Cong., 1st Sess., March 14, 1963, pages 609-16; Senate Report 96, 86th Cong., 1st Sess., March 9, 1959, pages 1412-24; House Report No. 1104, 83rd Cong., 2nd Sess., January 18, 1954, pages 2040-1; Conference Report No. 535, 82nd Cong., 1st Sess., May 21, 1951, pages 1512-13; Senate Report 1268, 80th Cong., 2nd Sess., May 12, 1948, page 2002.

Modern Circuit Opinions upholding constitutionality of civilian work have neglected to make vital distinction between interest to be weighed in total war and interest to be weighed during June, 1970.

O'Conner v. United States, 415 F.2d 1110 (9th Cir. 1969), upheld the constitutionality of civilian work and stated, without any reasons whatsoever, that alternative service does not deny religious freedom. The Court cited the

usual line of older cases, including Rase v. United States, 129 F.2d 204 (6th Cir. 1942) and Atherton v. United States, 176 F.2d 835 (9th Cir. 1949).

In *Rase* the defendant challenged alternative service provisions as violative of his First Amendment rights on the ground that he would be limited to the exercise of his religion only in a conscientious objector camp. The Circuit Court rightly held this argument was without merit, stating: "if valid, it would lead to the absurd result of a constitutional grant of immunity to all of Jehovah's Witnesses from the penalties of the criminal law, on the ground that they could not practice their religion while incarcerated. . ." *Id.* at 210.

In *Atherton*, 21 persons who had reported for civilian work and were already incarcerated in a conscientious objector camp refused to work on the ground, among others, that the law placed a penalty on their religious belief. This Court held that no penalty attached as appellants

were allowed freedom of worship, etc. In addition, O'Conner v. United States, *supra*, United States v. Henderson, 180 F.2d 711 (7th Cir. 1950) and CAnnon v. United States, 181 F.2d 354 (9th Cir. 1950). Both dealt with the duty to register, a totally different proposition, and one not involved here. No alternative service issue appears in either of these cases.

Another leading modern case is United States v. Boardman, 419 F.2d 110 (1st Cir. 1969), which on its face would, indeed, appear fatal to defendant's constitutional argument. After analysis, however, it will be clear that *Boardman* should not dispose of this matter.

To begin, petitioner submits *Boardman* seriously misconstrued Sherbert v. Verner, 374 U.S. 398 (1963). *Boardman* presented three issues on appeal, the first of which argued alternative service infringes his free exercise of religion. Discussing this issue, the First Circuit stated:

> "It has been repeatedly recognized that exemption from military service is a matter of congressional grace rather than constitutional compulsion. Since Congress can require everyone to submit to military discipline, the argument goes, it can also condition the grant of exemption on the performance of a less burdensome form of service." Id. at 112. (Citations omitted).

But the Supreme Court in *Sherbert* authoritatively disagrees: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placings of conditions upon a benefit or privilege." 374 U.S. at 404.

The *Boardman* court then continued:

> ". . . Congress may legitimately require alternative service to alleviate the unfairness which results if conscientious objectors continue to enjoy the fruits of civilian life while their fellow

> citizens are conscripted for onerous and sometimes hazardous duty. Congress may also require alternative service to avoid the difficulties implicit in granting a total exemption based on individual belief, such as the potential threat to the morale of the Armed Services, of the problem of distinguishing self-serving claims from belief which deserves the title 'conscientious.' " Id. at 112. (Citations omitted)

However, neither the briefs of the defendant Boardman nor the opinions of any of the courts involved in that case indicate the slightest evidence was presented by the government as to such alleged unfairness, threat to morale, or the problems of distinguishing self-serving claims. On the contrary, these appear to be the same kind of speculative hypothesizing which the Court struck down in *Sherbert* when it rejected the contention that unscrupulous claimants might

feign religious objections to Saturday work were the state required to pay unemployment benefits to Sabbatarians. The Court in *Sherbert* noted that "there is no proof whatever to warrant such fears of malingering or decit," and, "it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties," at least in the absence of a showing that no alternative form of regulation could combat such abuses without such infringement. 364 U.S. at 407.

Finally, in commenting upon and distinguishing older decisions, one must briefly discuss the analogy to compulsory jury service. A lead civilian work case, Heflin v. Sanford, 142 F.2d 798, 799 (5th Cir. 1944) sustained the constitutionality of alternative service in part based on this analogy. However, the analogy has been significantly undercut by *In Re Jenison*, 375 U.S. 14 (1963) which vacated and remanded an earlier decision of the Minnesota Supreme Court.

That decision declined to recognize a religiously compelled refusal to serve on a jury. On remand, the Minnesota Supreme Court, in obedience to the direction of the United States Supreme Court, announced a new doctrine that any "person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt," "until and unless" it appeared that the claim of religious liberty posed a serious threat to the jury system. 125 N.W.2d 588, 589 (1963).

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

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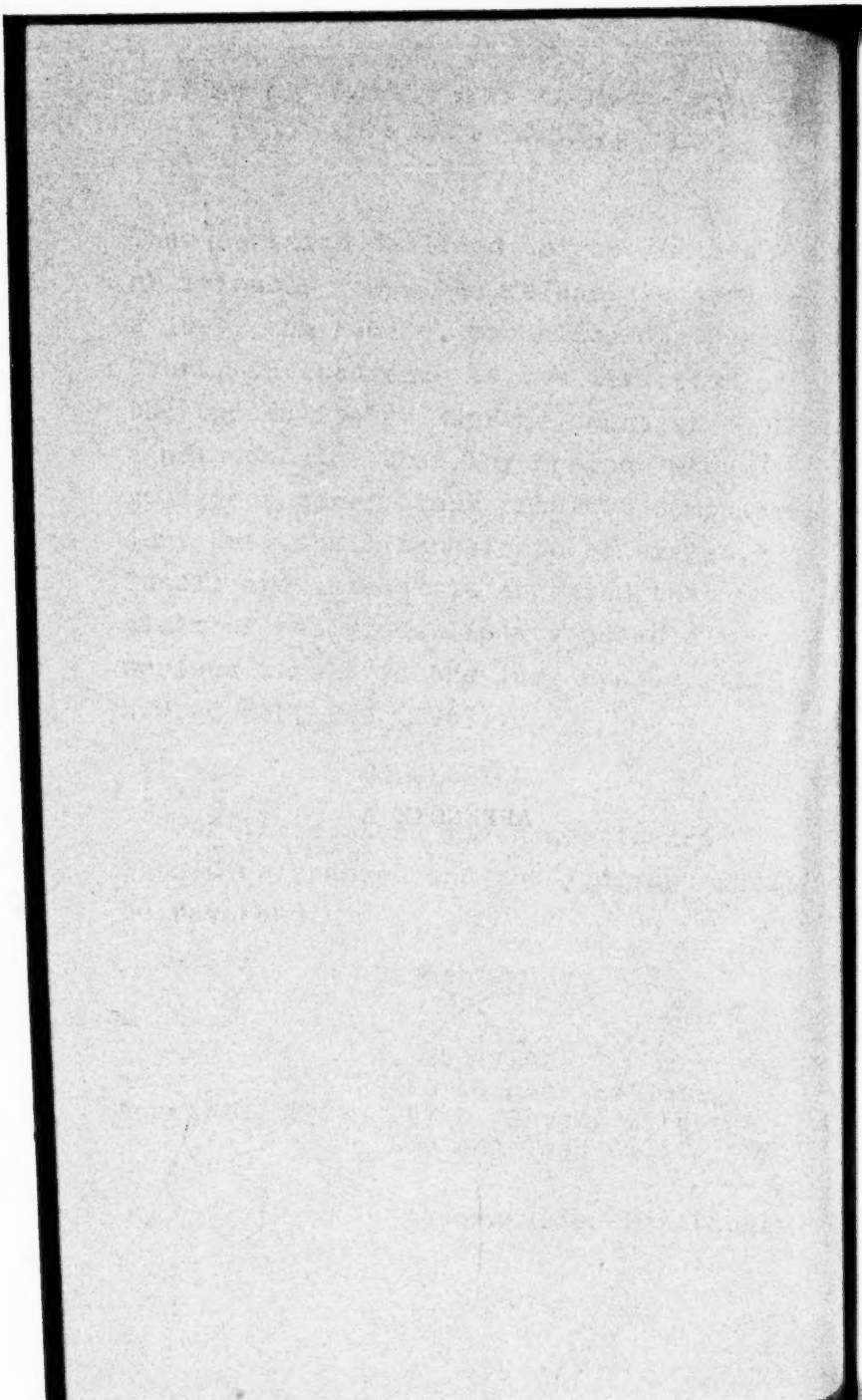
Attorney for Petitioner

April 12, 1973

APPENDIX A



UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. LOUIS EDWARD JENNINGS, *Defendant-Appellant.*	No. 72-2832

[January 18, 1973]

An appeal from the United States District Court for the District of Arizona

Before: CHAMBERS and BARNES, Circuit Judges, and JAMESON,* District Judge.

BARNES, Circuit Judge:

Jennings appeals from his conviction for violation of 50 U.S.C. App. §462(a) (Military Selective Service Act—failure to report for civilian employment), in the United States District Court for the District of Arizona. We affirm.

On October 10, 1967, Jennings filed SSS Form 150, Special Form for Conscientious Objector, with his local board. On January 8, 1969, however, he was classified I-A, and on January 8, 1969, he was ordered to report for induction. He refused to submit to that order. The United States Attorney did not prosecute, and Jennings' case was reprocessed by the Selective Service. On February 12, 1970, Jennings was placed in Class I-O, "conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest." 32 C.F.R. §1622.14 (1970).

On February 16, 1970, SSS Form 152, a special report form for conscientious objectors, was mailed to Jennings. The form

*The Honorable William J. Jameson, United States District Judge of Montana, sitting by designation.

entitled him to list the kind of civilian work he desired or was qualified to perform. The form was not returned to the local board and a second form was sent by certified mail. That second form was not returned. Thereafter, pursuant to 32 C.F.R. §1660.20(b), the local board sent Jennings a letter offering him three types of civilian work in Arizona. They were as follows:

A. Institutional Helper—Valley of the Sun School for Mentally Retarded Children . . .

B. Service Worker—Arizona's Children's Colony . . .

C. Hospital Work—St. John's Hospital . . .

Jennings returned the letter with the statement that he would not perform any of the work offered. On the back of the letter he requested an alternate list of available and acceptable work.

Pursuant to 32 C.F.R. §1660.20(c), the local board notified Jennings of its request for an interview with a representative of the State Director of the Selective Service. The interview was set for June 25, 1970, but Jennings did not report. The local board reviewed his complete file and determined that he should do service work at the Arizona Children's Colony. An order to this effect was signed by three members of the local board, to become effective upon approval by the National Director.

On July 2, 1970, Jenning's registration number was reached for induction. The local board forwarded his complete file to the National Director requesting approval for his designated social work and authorization for the work order. The order was authorized on August 3, 1970, and issued on August 7, 1970. Jennings was ordered to appear before the local board on August 19, 1970, to obtain instructions for his work at the Children's Colony. He failed to report to either the local board or the work project. He was subsequently indicted.

Trial was set for June 24, 1971, but the Order for trial was vacated. Jennings' Attorney and the United States Attorney agreed that the trial would be postponed to afford Jennings an additional opportunity to find appropriate work in the national interest. Jennings did not find work and the trial was reset for September 15, 1971. Jennings subsequently claimed to have hep-

atitis and trial was again reset for January 7, 1972. On December 27, 1971, Jennings obtained employment as a Nursing Assistant at the Maricopa County General Hospital to begin on January 3, 1972. A hearing was held in the District Court on February 14, 1972, and trial was postponed with the condition that Jennings work in a health care institution for a period of twenty-four months.

On the basis of the Court Order postponing the trial, the local board reclassified Jennings as IV-F. Jennings quit his job as a Nursing Assistant and was brought to trial and convicted.

The following issues are raised on appeal:

1. Whether the local board failed in its duty to consider alternative work for appellant?

2. Whether the order to report for work was valid?

3. Whether the evidence to support the judgment of conviction was ambiguous?

4. Whether the order to perform civilian work is constitutional?

1. *Duty to consider alternative work:* At trial, Jennings offered evidence that he performed social work in Cleveland with the United Church Board for Homeland Ministries and was prepared to do the same work to satisfy his military obligation. Two letters attesting to his qualifications for such work were sent by the religious organization to the local board. On the basis of this evidence, Jennings claims that the local board failed to designate a proper job alternative as required by 32 C.F.R. §1660.20.

In view of the facts, this claim is patently without merit. Jennings was given the opportunity on two separate occasions to list the kind of civilian work which he preferred on SSS Form 152, but he chose not to so designate. When he was extended the opportunity to meet with a representative of the State Director of the Selective Service to discuss the work, he failed to attend the scheduled meeting. He cannot now complain that the work chosen for him was inappropriate. This Court's ruling in *Daniels v. United States*, 404 F.2d 1049 (9th Cir. 1968) is dispositive. Relying on *Laughorne v. United States*, 394 F.2d 129, 130-131 (9th Cir. 1968), we stated at page 1051:

". . . a conscientious objector may not deny his local board's right to require him to perform any civilian work whatever, refuse to make any choice as to willingness to perform among the several kinds of work so offered him, and then, on his prosecution for failing to report to perform the particular work designated by the board, undertake to set up the defense that he regards the work as not being appropriate. On his unwillingness to engage in any such discussion before the board when he was afforded the opportunity to do so, and with his continued adherence to an unwillingness to perform any work designated by the board in lieu of military service, the question of the appropriateness of the particular work assigned to him would be a matter of no significance on his trial as related to intent to violate the Act in refusing to obey the board's order."

2. *Validity of the work order:* The order to report for work is said to be invalid for three reasons. First, the local board is said to have abdicated its duty to choose the work to the State Director in violation of the duty imposed on the board by 32 C.F.R. §1660.20(b). But in *Mang v. United States*, 339 F.2d 36 (9th Cir. 1964), we held that the action of the local board, such as found here, was not an abdication of responsibility within the meaning of the Regulations.

Second, Jennings argues that the choice was punitive because the work at the Children's Colony was menial; not suited to his abilities. This is a baseless accusation. No evidence was presented to substantiate the claim. The District Judge did not find the order punitive, and we can not hold to the contrary.

The order is finally said to be invalid because "[t]here is no evidence that the Order of Call was followed." (Appellant's Brief at 18). The burden of going forward with the evidence to prove this fact is on the appellant-defendant, not the Government. *United States v. Smith*, 443 F.2d 1278 (9th Cir. 1971).[1] Without

[1] In *United States v. Baker*, 416 F.2d 202 (9th Cir. 1969), we held that "the Government need not affirmatively prove that a registrant was . . . (selected in order) . . . but may rely upon the presumption of regularity surrounding official proceedings to establish that fact." 416 F.2d at 205. *Accord, Rusk v. United States*, 419 F.2d 133, 136 (9th Cir. 1969).

evidence to the contrary, we conclude that the Order of Call was proper.

For these reasons we find that the order to work was valid.

3. *The evidence:* Jennings argues that the evidence to support his conviction was ambiguous because there is no explanation for his work at the Maricopa County General Hospital. This argument is frivolous. The District Court was thoroughly familiar with Jennings' last minute efforts at the Hospital, as it was with his entire Selective Service file.

4. *Constitutional issues:* Jennings argues that the order to perform civilian work is unconstitutional. We have reviewed this issue several times in the past and have consistently found such orders to be well founded, constitutionally. *United States v. Anderson*, 467 F.2d 210 (9th Cir. 1972); *United States v. Campbell*, 439 F.2d 1087 (9th Cir. 1971).

AFFIRMED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 1-23-73—480

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LOUIS EDWARD JENNINGS,

Defendant-Appellant.

No. 72-2032

O R D E R

Before: CHAMBERS and BARNES, Circuit Judges, and JAMES M., District Judge.*

WHEREAS appellant filed Petition for Rehearing on February 9, 1973; and

WHEREAS on March 7, 1973, appellant filed a Motion for Permission to file Memo of New Authorities, together with Memo of New Authorities Supporting Petition for Rehearing, received by the Clerk of this Court on March 7, 1973;

NOW THEREFORE, good cause appearing, it is the Order of this Court that said Memo of New Authorities Supporting Petition for Rehearing be filed, and that said Petition for Rehearing be denied.

Stanley N. Barnes,

United States Circuit Judge

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* The Honorable William J. Jameson, Senior United States District Judge of Montana, sitting by designation.

PART 1660—CIVILIAN WORK IN LIEU OF INDUCTION

1660.1 Definition of Appropriate Civilian Work.—(a) The civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1[illegible].1.

1660.20 Determination of Type of Civilian Work To Be Performed and Order by the Local Board to Perform Such Work.—(a) When a registrant in Class I-O has been found qualified for service in the Armed Forces after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after a Statement of Acceptability (DD Form 62) has been mailed to him by the local board or within ten days after he has failed to report for

[illegible] No. 67 —
[illegible] October 1967

but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1411

LOUIS EDWARD JENNINGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the Selective Service Board's selection of his civilian work assignment, to be performed in lieu of military service, and also contests the constitutionality of peace-time work orders.

After a jury-waived trial in the United States District Court for the District of Arizona, petitioner was convicted of having failed to report for civilian work in violation of 50 U.S.C. App. 462(a). He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

The facts are set out in the opinion below. Briefly, they show that petitioner, after having successfully obtained conscientious objector status, received SSS Form 152 which provided him with an opportunity to

list the types of alternative civilian work he desired or considered himself qualified to perform. Petitioner failed to return the form and another was sent by certified mail. When the second form was not returned, the local board, pursuant to 32 C.F.R. 1660.20(b), sent petitioner a letter offering him three choices of civilian work, all located within his state of registration. He returned the letter refusing to accept any of the choices and requesting an alternate list. Thereafter, the local board, acting under 32 C.F.R. 1660.20(c), requested petitioner to attend an interview with a representative of the State Director of the Selective Service System. Upon petitioner's failure to report for the interview, it was determined that he should work at the Arizona Children's Colony, a work choice offered on the original list. When petitioner's registration number was reached for induction, the National Director authorized the work order and ordered him to appear before the local board for assignment to the Children's Colony. When he failed to report, petitioner was indicted.

After several trial dates had been scheduled, petitioner's trial was postponed on the condition that he work in a health care institution for twenty-four months. Petitioner obtained employment as a hospital nursing assistant and was reclassified IV-F. He thereafter quit the job, and his trial and conviction followed.

1. Petitioner contends that the board failed to consider his choice for alternative civilian work. Petitioner refers to two letters sent by officials of a religious organization to his local draft board in April 1968 in support of his original application for conscientious objector status. The letters stated that the organization was prepared to offer petitioner work for two years in fulfillment of his alternate service obligation (Pet. 6-10). Petitioner

was not actually classified as a conscientious objector, however, until February 1970 (Pet. App. A, p. 1).[1] At no time after his reclassification did petitioner refer the local board to the earlier letters or in any other way request assignment to particular civilian work, although he was given full opportunity to do so. It was not until the appeal from his conviction that petitioner asserted that he had been denied his proper choice of civilian work. Having failed to avail himself of the existing administrative remedies for contesting his work assignment, he is foreclosed from raising that defense here. See *McGee* v. *United States*, 402 U.S. 479; *Lockhart* v. *United States*, 420 F. 2d 1143 (C.A. 9); see also *Daniels* v. *United States*, 404 F. 2d 1049 (C.A. 9).

2. Petitioner's claim that the Selective Service System failed to provide assistance is unfounded. Petitioner's local board and the United States Attorney's Office were fully cooperative. Petitioner's trial was postponed three times to afford him the opportunity to find suitable employment. Moreover, he was allowed to obtain a job as a nursing assistant in fulfillment of the work requirement in lieu of prosecution. Only after he left this job was he finally brought to trial (Pet. App. A, pp. 2-3).

3. Petitioner also asserts that the board's order for alternative civilian work was punitive. But Congress provided alternative service for those who in conscience could not participate in war as an accommodation to their beliefs, not as punishment for being conscientious objectors. In assigning petitioner to two years' civilian

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[1] Petitioner's original claim for conscientious objector status was rejected. After the United States Attorney refused to prosecute petitioner for his subsequent refusal to submit to induction, petitioner was reclassified as a conscientious objector (Pet. App. A, p. 1).

work,[1] the Selective Service System deferred to his personal convictions and chose for him an alternative way in which he could serve his country for two years. There is nothing in the Due Process Clause to suggest that he should be relieved entirely of that obligation. Conscientious objector status provides an exemption from military service. Because of its unique nature, the special treatment Congress has determined should be accorded to persons placed in Class I-O is a reasonable one. See generally *United States* v. *Holmes*, 387 F. 2d 781, 785 (C.A. 7), certiorari denied, 391 U.S. 936; cf. *Atherton* v. *United States*, 176 F. 2d 835 (C.A. 9).

4. Finally, petitioner's claim that civilian work orders are unconstitutional does not warrant review by this Court, since similar contentions have been repeatedly rejected by the Court in the past, and there is no conflict on the point among the lower federal courts. As stated in our opposition in *Dinnell* v. *United States*, No. 72-5930, certiorari denied, March 5, 1973, there is no constitutional infirmity in assignment to peace time work.[2] See also *United States* v. *Campbell*, 439 F. 2d 1087 (C.A. 9); *United States* v. *Boardman*, 419 F. 2d 110 (C.A. 1), certiorari denied, 397 U.S. 991; *Loewing* v. *United States*, 392 F. 2d 218 (C.A. 10), certiorari denied, 393 U.S. 878; *O'Moore* v. *United States*, 370 F. 2d 916 (C.A. 5); *United States* v. *Anderson*, 467 F. 2d 210 (C.A. 9), certiorari denied, No. 72-5978, March 19, 1973.

We note further that petitioner's attack on the validity of *United States* v. *Boardman, supra*, is unfounded. He claims that the First Circuit there misconstrued *Sherbert* v. *Verner*, 374 U.S. 398. In our view, however,

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[2] A copy of our memorandum in opposition in *Dinnell* is being furnished to petitioner's counsel.

the *Boardman* court properly distinguished *Sherbert*, which held that state action denying unemployment compensation to one who refused to work on a religious holiday was a denial of the First Amendment freedom of religion. As *Boardman* explained, that situation was quite different from this type of case where, in return for exempting conscientious objectors from military service, Congress required the performance of civilian work. See 419 F. 2d at 113. Unlike the condemned state action in *Sherbert*, the requirement of civilian work in no way "penalizes the free exercise of [petitioner's] constitutional liberties." 374 U.S. at 406. To the contrary, civilian work orders are themselves a manifestation of the government's deference to those whose religious and moral beliefs prevent them from engaging in military service.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.